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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-184

ORIGINAL COPY

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES DOWDELL, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT AGOSTINELLI
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OF COUNSEL

QUESTION PRESENTED FOR REVIEW

WHETHER RESPONDENT WAS INVOLUNTARILY SEIZED FOR FOURTH AMENDMENT PURPOSES WHERE THREE POLICE OFFICERS CAME TO HIS HOME, ASKED HIM TO ACCOMPANY THEM TO THE POLICE STATION FOR ROUTINE QUESTIONING, REFUSED TO ANSWER HIS QUESTION AS TO WHY IT WAS NECESSARY TO GO TO THE POLICE STATION, TOOK HIM IN A POLICE CAR TO THE STATION AND INTO AN INTERROGATION ROOM AND WARNED HIM OF HIS MIRANDA RIGHTS, BUT NEVER TOLD HIM THAT HE WAS FREE TO GO.

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THE RESPONDENT WAS INVOLUNTARILY SEIZED FOR FOURTH AMENDMENT PURPOSES WHERE THE ACTIONS OF THE POLICE IN THIS CASE WERE VIRTUALLY INDISTINGUISHABLE FROM THE ACTIONS OF THE POLICE IN DUNAWAY V. NEW YORK, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979).

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Unreported Order of the Illinois Supreme Court denying Petition for Leave to Appeal

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United States v. Mendenhall, ___ U.S. ___, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) . 3, 4, 5, 6, 8

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PRAYER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

May It Please The Court:

The Respondent, James Dowdell, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the Appellate Court of Illinois, Third Judicial District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 81 Ill. App. 3d 266, 401 N.E. 2d 295 (3rd Dist. 1980). A copy of the official opinion

is attached as Appendix A to Petitioner's Petition for Writ of Certiorari. The Order of the Illinois Supreme Court denying leave to appeal, which is not included in the Petition For Writ of Certiorari, is attached hereto as Appendix A. The Order of the Illinois Supreme Court denying Petitioner's Motion for Leave to File a Motion for Reconsideration of the Order denying Petition for Leave to Appeal is attached to the Petition for Writ of Certiorari in Appendix B.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for a Writ of Certiorari. However, as is treated more fully in the Argument portion of this Brief in Opposition, Respondent does not believe that Petitioner has shown any reason for this Court to grant the Petition in the exercise of its sound judicial discretion.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

AMENDMENT IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the legal protection of the law.

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case as contained in the Petition for a Writ of Certiorari and in the opinion below.

REASON FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

THE RESPONDENT WAS INVOLUNTARILY SEIZED FOR FOURTH AMENDMENT PURPOSES WHERE THE ACTIONS OF THE POLICE IN THIS CASE WERE VIRTUALLY INDISTINGUISHABLE FROM THE ACTIONS OF THE POLICE IN DUNAWAY V. NEW YORK, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979).

In essence the Petitioner's request for a Writ of Certiorari presents the question of whether the facts at bar are more closely akin to those present in United States v. Mendenhall, ___ U.S. ___, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980), which held that the defendant had not been involuntarily seized for Fourth Amendment purposes, or Dunaway v. New York, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979), in which it was held that the defendant was seized for Fourth Amendment purposes. Thus, the Petition does not present a novel question of law or a legal question over which there is conflict among the various State and Federal lower appellate courts. This case simply presents a question as to whether settled principles of law were properly applied to a given set of facts. For this reason alone the case at bar is not an appropriate one for review by this Court.

Since the issue, as framed by the Petitioner, requires a comparison of the facts at bar to this Court's recent decisions in Dunaway v. New York and United States v. Mendenhall, Respondent will first fully compare this case to Mendenhall in order to demonstrate that the two cases are not even remotely

similar. Second, Respondent will compare this case to Dunaway v. New York which is virtually indistinguishable from the facts at bar.

In United States v. Mendenhall, the respondent was approached by two drug enforcement agents walking through the concourse of the Detroit Metropolitan airport because she fit the Drug Enforcement Agency's so-called "drug courier" profile. The agents identified themselves as federal agents and asked to see her identification and airline ticket. The respondent produced her driver's license which was in the name Sylvia Mendenhall and an airline ticket which bore the name of "Annette Ford". When asked why the ticket bore a different name from her own, the respondent states that she "just felt like using that name." In response to further questions, the respondent indicated that she had been to California for two days. At this point, one of the agents specifically identified himself as a federal narcotics agent and returned Mendenhall's airline ticket and driver's license to her. The agent then asked Mendenhall if she would accompany him to the DEA office for further questions. Mendenhall did so although the record does not indicate whether she gave a verbal response.

At the DEA office, Mendenhall was asked by the agent if she would allow a search of her person and handbag and was expressly told that she had the right to decline the search. Mendenhall said "Go ahead" and an airline ticked issued to "F. Bush" was found in her purse. A short time later, a female police officer arrived to conduct a search of Mendenhall. The officer asked the agents if Mendenhall had consented to be searched and they responded that she had. Mendenhall was then asked if she had consented to be searched and she responded that she did. Mendenhall subsequently handed over a package of heroin to the agent which she had concealed in her undergarments.

Based on these facts, a majority of five Justices concluded that Mendenhall had voluntarily consented to accompany the agents to the DEA office (Part IIB, 64 L. Ed. 2d at 511-512). Only two justices concluded that Mendenhall had not been "seized" (Part IIA, 64 L. Ed. 2d at 507-511), while three other justices apparently concluded that she had been reasonably seized because the agents had a reasonable suspicion that she was engaged in criminal activity (Concurring opinion, 64 L. Ed. 2d at 513-517)[1].

There are four key factual distinctions between the instant case and Mendenhall. First, the Respondent at bar was not stopped in a public place such as an airport, he was approached in his own home by two police investigators and a third uniformed police officer (R69-70, 102-103).

Second, the Respondent at first did not simply acquiesce to the verbal request. When the investigators asked the Respondent to accompany them to the police station for questioning, the Respondent asked them what they wanted to question him about. The officers refused to answer, indicating that they needed to question him at the police station.[2] The Respondent sought to exercise some control over the situation, but was rebuffed by the investigators.

Thirdly, the defendant at bar did not simply walk a few feet to an office located in a building associated with public transportation, he was driven to a police station and placed in an interrogation room.

---

[1]In the case at bar Petitioner conceded in the trial and appellate court that there was no probable cause for a Fourth Amendment seizure of the Respondent (R86, 98, 143, 158).

[2]The Respondent and his girlfriend testified that he four times asked the purpose of going to the station, with the officers refusing to respond, except to say that questioning could only be done at the police station. According to the Investigators, Respondent made the request for information only once, although they also conceded that they declined to tell the Respondent why they wanted him to go to the station except generally to question him (R18-22, 50-59, 74-76, 110).

Petitioner argues that the Respondent was advised that he could take his own automobile if he wanted and meet the officers at the police station (Pet. at P. 9). If this offer were in fact made,[3] it would not serve to remove the feeling of obligation created by the officers' earlier actions of going to the Respondent's house in a group of three, refusing to respond to Respondent's question and requesting his presence at the police station.

A critical fourth distinguishing factor is that the Respondent here, unlike Ms. Mendenhall, was warned of his constitutional (Miranda) rights after being placed in the interrogation room. If the Respondent had in fact acted voluntarily and consented to being taken to the police interrogation room, he would not have been in their custody, and thus Miranda warnings would have been unnecessary.

While these facts are significantly distinguishable from United States v. Mendenhall they are significantly indistinguishable from those present in Dunaway v. New York.

In Dunaway the defendant was found by three police officers at the home of a neighbor. The defendant was asked by a police officer if he would accompany the officers to police headquarters for questioning and he responded that he would. The defendant was not told that he was under arrest or in custody and was not warned not to resist or flee. He was also never told that he was "free to go" if he so desired. No weapons were displayed and petitioner was not handcuffed. Each police officer testified that the defendant was not touched or held during the trip to the station. The police officers in Dunaway testified that Dunaway would have been physically restrained if he had refused to accompany the officers or had tried to escape. The defendant

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[3]Investigator Downey testified that he believed that he made such an offer while Investigator McGuire and the defendant testified that they could not recall such an offer being made (R77, 113, 60).

was transported to the police station where he was given Miranda warnings and subsequently questioned. This Court concluded that based on these facts the defendant in Dunaway had been detained for custodial interrogation and was thus protected by the Fourth Amendment requirement of probable cause.

The facts at bar are virtually indistinguishable from those in Dunaway and thus the defendant at bar was also protected by the Fourth Amendment requirement of probable cause. In the instant case, the Respondent was found by the police at his own home by three police officers (R69-70, 102-103). As in Dunaway, the officers did not question the Respondent at his home. In addition the officers at bar refused to inform the Respondent of the nature of their investigation after a specific inquiry by the Respondent (R72-74, 109-110). Also as in Dunaway, the Respondent was transported in a police car to the police station where he was placed in an interrogation room and advised of his Miranda rights (R80, 113, 116). As in Dunaway, the Respondent was neither told that he was under arrest (R76) nor informed that he was free to go.

The only distinguishing feature in Dunaway is the fact that the police in Dunaway testified that the defendant "would have been physically restrained" had he attempted to leave, while the officers at bar testified that they "would have let [the Respondent] go" had he chosen to leave (R86). In neither case was the intent of the officers communicated to the defendant.

It is clear from the opinion in Dunaway that the officer's testimony that they "would have" restrained the defendant was not the controlling factor in the Court's determination that the defendant had been detained for custodial interrogation. In its opinion, this Court states "[t]here can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station." In footnote

six, the Court refers to the A.L.I. Model Code of Pre-Arraignment Procedure §2.01(3) and commentary, at 91 (Tentative Draft No. 1, 1966) which states that "a request to come to police station may easily carry an implication of obligation, while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen." (emphasis added). This language indicates that the decision of this Court turned upon the objective factors present in that case, including the fact that the defendant was never informed that he was not under arrest and never told that he was "free to go". The language in the opinion does not indicate that the police officer's subjective intent was the determinative factor in deciding the issue.

The Petitioner here, nevertheless seeks to distinguish Dunaway v. New York, by arguing that the subjective intent of the officers in Dunaway, as evidenced by the order to "pick up" the defendant, is what led this Court to the conclusion that he was involuntarily seized. (Petition for Writ of Certiorari at pp. 11-13). What the Petitioner ignores is that this very same fact was present in United States v. Mendenhall. The subjective intent of the DEA agents was to detain Ms. Mendenhall if she had attempted to leave their presence. (Dissenting opinion, 64 L. Ed. 2d at 522, footnote 12). Given these facts it is clear that the subjective intent of the law enforcement agents was of little or no significance in deciding both Dunaway and Mendenhall. It was the objective factors which this Court relied upon in both cases.

In summary, Respondent submits that this case does not warrant review by this Court because it presents no new, novel or conflicting Constitutional question. It simply presents the question of whether this case is more closely akin factually to United States v. Mendenhall or Dunaway v. New York. Furthermore Dunaway v. New York is virtually indistinguishable factually from the case at bar and is not even remotely similar to United States v. Mendenhall.

CONCLUSION

Wherefore, the Respondent prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR RESPONDENT

APPENDIX

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

May 29, 1980

State Appellate Defender
Third Judicial District
628 Columbus St., Suite 308
Ottawa, Illinois 61350

No. 53314 - People State of Illinois, petitioner, vs. James Dowdell, respondent. Leave to appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

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MAY 30 1980
OFFICE OF THE STATE APPELLATE DEFENDER
OTTAWA, ILLINOIS

IN THE

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OCTOBER TERM, 1980

NO. 80-184

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES DOWDELL, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, James Dowdell, by and through his counsel, Robert Agostinelli, Deputy Defender, Office of the State Appellate Defender, Third Judicial District, requests leave to file the attached Respondent's Brief in Opposition without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46. The Respondent was previously granted leave to proceed in forma pauperis in this cause both in the Illinois Appellate and Supreme Courts.

An affidavit in support of this Motion is attached hereto.

Robert Agostinelli
ROBERT AGOSTINELLI

SUBSCRISED AND SWORN TO
Before me this 25th day
of September, 1980.

Donna Fair
Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-184

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES DOWDELL, RESPONDENT

A F F I D A V I T

I, James Dowdell, being first duly sworn according to law, deposes and says, in support of my Motion for Leave to Proceed without being required to prepay costs and fees:

1. I am the Respondent in the above-entitled cause.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in the said cause.

James Dowdell
JAMES DOWDELL
Affiant

SUBSCRIBED AND SWORN TO
Before me this 15 th day
of Sept ber, 1980.

Dawn Barr
NOTARY PUBLIC

STATE OF ILLINOIS)
COUNTY OF Will)

IN THE CIRCUIT COURT OF THE
12th JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,)
)
-VS-) Indictment No. W78 C 115
)
JAMES H. DOWDELL)

ORDER FOR FREE TRANSCRIPT AND APPOINTMENT
OF THE OFFICE OF THE STATE APPELLATE DEFENDER
AS COUNSEL ON APPEAL

It appearing to the Court that the above named defendant desires to appeal from the order entered by the Court on October 18, 1978, and the defendant is indigent and requests the appointment of counsel in accordance with Supreme Court Rule 607(a), and that he requests a report of proceedings in accordance with Supreme Court Rule 607(b).

IT IS THEREFORE ORDERED THAT

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

is hereby appointed to represent the above named defendant for purposes of appeal.

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and file a Notice of Appeal on behalf of the above named defendant, and shall send a copy of the Notice of Appeal to the defendant's counsel.

IT IS FURTHERORDERED that the Official Shorthand Reporter of this Court shall:

(a) Forthwith transcribe an original and a copy of all the notes taken of the proceedings in the above entitled cause;
(b) Without charge to the defendant and within forty-nine days from the date the Notice of Appeal is filed, file the original of the Report of Proceedings with the Clerk of the Court and on the same day mail or deliver the copy of the Report of Proceedings to the defendant.

IT IS FURTHER ORDERED that the Clerk of this Court shall:

(a) Send a copy of this order to the defendant and to defendant's counsel;
(b) Prepare and certify the Record on Appeal pursuant to Supreme Court Rules 324 and 608;
(c) File the Record on Appeal in the reviewing court within sixty-three days from the date the Notice of Appeal is filed, or file a Certificate in Lieu of Record pursuant to Supreme Court Rule 325 and send the Record on Appeal to the defendant's counsel.

ENTER:

Angelo J. Pistorius
JUDGE

DATED Oct. 23, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-184

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES DOWDELL, RESPONDENT

CERTIFICATE OF SERVICE

I, Robert Agostinelli, a member of the bar of this Court and representing Respondent in this cause, certify:

1. That I have served one copy of the Motions for Leave to Proceed in Forma Pauperis, the Affidavits in support thereof, and the Respondent's Brief in Opposition upon both of the below named representatives of the Petitioner herein, by depositing same in a United States Post Office mail box at 628 Columbus Street, Ottawa, Illinois 61350, with first class postage prepaid, and with the envelopes addressed as follows:

Honorable Tyrone Fahner
Attorney General
188 W. Randolph - Suite 2200
Chicago, Illinois 60601

Mr. John X. Breslin
Deputy Director
Illinois State's Attorneys
Appellate Service Commission
628 Columbus Street - Suite 402
Box 654
Ottawa, Illinois 61350

2) The above named parties are the only parties required to be served.

DATED: 9-25-80

Robert Agostinelli
ROBERT AGOSTINELLI

STATE OF ILLINOIS)
COUNTY OF Will)

IN THE CIRCUIT COURT OF THE 12th JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,)
-VS-) Indictment No. W78 C 115
JAMES H. DOWDELL)

ORDER FOR FREE TRANSCRIPT AND APPOINTMENT OF THE OFFICE OF THE STATE APPELLATE DEFENDER AS COUNSEL ON APPEAL

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Office of the State Appellate Defender
Third Judicial District
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ENTER:

Angelo J. Pistorius
JUDGE

DATED Oct. 23, 1978